No. 13,675

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD B. CALDERON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

It is hardly accepted appellate practice to present the Circuit Court of Appeals with defendant's personality, background, economic standing, education, and general qualifications as a citizen as the focus of the contentions on appeal. Such, however, is the position of counsel for the appellant in the instant case.

The "Americans" in border towns are not constrained to affection, or even tolerance, for their "Spanish-American" neighbors, especially those of little formal education and indifferent background who become reasonably affluent through business in the small border town community. In this case, however, a court-limited number of character witnesses, including three prominent business men of Douglas, Arizona, besides its Mayor, Chief of Police, a United States Commissioner, a former deputy collector of the Internal Revenue Department, and a past member of the Arizona State Legislature, traveled to the District Court in Tucson to attest the honesty, industry, and honorable citizenship of Edward Calderon.

The Government witness, Eugene Verdugo, testified that he had told the Treasury Investigators on several occasions that Calderon was absolutely incapable of an intent to defraud his government. (R. 141)

Because his fellow citizens, who know him best, believe that uneducated, but industrious and reliable "Eddie" Calderon could not be guilty of an intent to defraud his government, we, his counsel, feel completely justified in insisting that the trial of Edward Calderon be tested by every ground of due process, however technical, to the end that Calderon may be vindicated and true justice may be done.

ARGUMENT

I

EXTRA-JUDICIAL ADMISSIONS, CONVERSATIONS OR STATEMENTS OF THE DEFENDANT, DO NOT GAIN THE DIGNITY OF EVIDENCE WITH PROBATIVE VALUE UNLESS INDEPENDENT EVIDENCE, CONCERNING SOME PORTION OF THE CRIME AND TENDING TO ESTABLISH THAT PORTION AS A FACT, IS PRODUCED BY THE PROSECUTION.

The above fundamental legal point in this case has been cleanly etched by this Court by a comparison of two cases reported in Volume 198 of the Federal Second Reporter. On page 231 in the *Davena Case*, this Court pinpointed the error of the broad language in *U. S. vs. Fenwick (7 C.A.) 177 Fed. 2d 488*, where it was generally declared that before extra-judicial statements of the defendant could be given probative force, the OFFENSE CHARGED must have been proved by independent evidence. This Court declared that the Ninth Circuit had long ago adopted the rules best enunciated in the case of *Daeche vs. United States (2 C. A.) 250 Fed. 566 at 571*, (restated in varying forms in other cases cited in the footnotes); concerning such point, *this* Court said:

> ". . . Since here (9th Circuit) it is established that the evidence corroborating a confession of the defendant need not independently prove the commission of the

> *crime charged* neither beyond a reasonable doubt, nor by a preponderance of proof." (Emphasis supplied)

The *Davena Case* cited *D'Aquino vs. U. S., 192 Fed. 2d 338 at 357* wherein this Court pointed out it was not necessary that the actual *crime charged* be proved by independent evidence, but that if the independent evidence tended to establish part of the offense, or, if from independent evidence it is reasonably certain that some element of the crime charged has been committed, the admissions of the defendant gain probative force.

The classic description is found in the case of *Daeche vs. U. S. (supra) at page 571* where Justice Learned Hand said:

> "We start therefore, with the assumption that some corroboration is necessary, and the questions are to what extent must it go, and how shall the jury deal with it after it has been proved. *The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed* and under which any corroborating circumstances will serve which in the Judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither

> beyond a reasonable doubt, nor by a preponderance of proof." (Emphasis supplied)

In considering the evidence against Davena, this Court pointed to independent evidence which was sufficient to comply with the rule. This was the direct testimony of one prostitute that she had paid money to Davena which was not reported as income.

If, after the lesson found in the *Davena Case*, attorneys practicing in the Ninth Circuit needed further instruction, this Court, *at page 782 of 198 Fed. 2d, in the Spriggs Case*, said:

> "Whether this evidence, upon which the judgment below must stand or fall, is to be regarded as a confession, or as admissions, or as extra-judicial statements, is of no consequence here. Under any name, they are insufficient to sustain the conviction, for there has been no independent proof of any crime having been committed. We deem it unnecessary to decide whether the lower Court erred, as appellant contends, in admitting this testimony of certain government agents concerning statements made to them by appellant. Even if the admissibility of such testimony be assumed, arguendo, the government case still falls far short of establish-

> ing the guilt of appellant by the further evidence required by our decision in the Davena Jr. vs. U. S., 9 Cir., 198 F 2d 230."

Thereby, in comparison, plainly marking what is and what is not sufficient proof to give defendant's admissions value as proof. Therefore, the question is:

IS THERE INDEPENDENT EVIDENCE WHICH TOUCHES ON THE CORPUS DELICTI, IN THE SENSE OF THE INJURY AGAINST WHOSE OCCURRENCE THE LAW IS DIRECTED, IN THE INSTANT CASE?

As we understand it, the government contends that the extra-judicial statements of the defendant are independent evidence which support each other.

We wish to call attention to the fact that the same argument was made by the preceding United States Attorney for Arizona in the *Spriggs Case*.

Notice here that on page 5 of Appellee's Brief, counsel for the government seeks to establish "Cash on Hand" by the extra-judicial statements of the defendant. On page 6 he seeks to corroborate this and support it by other statements of the defendant made in a different form.

Then, counsel for the government attempts on page 10 to corroborate both statements, previously relied upon, with the admission of the defendant

as made to Eugene Verdugo *after the investigation had begun.* Appellee is evidently of the opinion that statements made to a private citizen have more probative force and are of more value than those testified to by a government agent. Again, on page 11, the so-called "affidavit of the defendant" (Exhibit 11) is depended upon for further independent evidence and corroboration. Such affidavit is of no more dignity than other statements or admissions made to investigating officers.

Please, notice that the Government's Brief does not mention any real independent evidence of any sort which tends to establish or touch upon any part of the crime in question.

On page 6 of their brief, the Government suggests that under the rule in *United States vs. Hornstein (7 C. A.) 176 Fed. 2d 217* and the cases of *U. S. vs. Zimmerman (7 C. A.) 108 Fed. 2d 370* and *U. S. vs. Guzik (7 C. A.) 54 Fed. 2d 618* evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income. While this rule may apply when probative evidence establishes the *FACT* of unexplained income, unless the "Net Worth" was established on evidence of probative value, there was no unexplained income here.

The Government relied upon testimony of Agent Tucker for the figures of the "Net Worth State-

ment" by which it was supposed the Government could establish unexplained funds or property in the hands of Calderon. This testimony of Tucker is of absolutely no probative value unless the Government has established the assets and net worth of the taxpayer at the beginning of the period during which the alleged evasion occurred.

Davena Jr. vs. U. S., 198 Fed. 2d 230 at 232.

But, to establish the "*cash on hand*" and, thus, the net worth of the defendant at the beginning of 1945, the Government relies *only upon the extra-judicial statements of the defendant.*

In the Davena Case, the "Net Worth Method" having been established properly, such evidence of net worth was in itself properly received as some further evidence of the corpus delicti.

In the instant case, however, unless there is some independent evidence touching the corpus delicti, the statements of the defendant to Mr. Tucker and Mr. Webb, Government Agents, have no probative value and are not sufficient to establish the "Cash on Hand" item. Thus, if we are correct, net worth figures as computed by Tucker are not proof or evidence of unexplained funds in the hands of the taxpayer.

We believe the facts in the *Spriggs Case* are strikingly similar to the instant one. The probative force of statements made by a defendant in an in-

come tax evasion case, as testified to by Federal Agents, by other persons, and as presented by written admission signed at the behest of the Federal Agents, are settled in that case.

Since both appellant and appellee agree that the only evidence of the commission of a crime in the instant case *is supplied solely by statements and admissions of the appellant,* the Motion for Directed Verdict should have been granted and the case should be reversed.

II

WHEN THE GOVERNMENT RELIES UPON CIRCUMSTANTIAL EVIDENCE IN THE FORM OF "THE NET WORTH METHOD" TO PROVE THE GUILT OF A DEFENDANT CHARGED WITH INCOME TAX EVASION, TO EXCLUDE EVERY REASONABLE HYPOTHESIS OF THE DEFENDANT'S INNOCENCE SO AS TO HAVE PROBATIVE FORCE, THE "NET WORTH STATEMENT" MUST BEGIN WITH ABSOLUTE AND CERTAIN ASSETS, CLEARLY ESTABLISHED BY COMPETENT PROOF.

Davena, Jr. vs. U. S. (supra)

U. S. vs. Fenwick (supra)

In the *Bell Case* it was suggested that, in a practical sense, the "Net Worth Method" could never be used if the extra-judicial statement of the defendant could not be given probativ force. *This is true,* as usually only the defendant really knows, or can bind himself with the certainty of number and val-

uation of assets which the rule requires. But, probative force can be given to the extra-judicial statements of the defendant to establish the beginning of a net worth statement, *only when other independent evidence exists of the commission of a portion of the crime concerned with the defendant.*

An examination of the various income tax evasion cases cited by the government counsel and also found in the Digest System clearly outlines the government's difficulty. There is really no question about the rule. In most tax fraud cases there is ample, extrinsic or intrinsic, independent evidence to establish the corpus delicti. In most cases the defendant is guilty and the "indicia of guilt" is so prevalent that some independent evidence always arises.

A comparison of the three cases of *U. S. vs. Hornstein, 176 Fed. 2d 217,* and *U. S. vs. Yeoman-Henderson, 193 Fed. 2d 867,* and the case of *U. S. vs. Fenwick, 177 Fed. 2d 488,* from the Seventh Circuit, beautifully illustrates our point.

In the Hornstein Case (supra), the Government, *through independent witnesses,* proved some twenty-five individual sales of jewelry by the defendant and then showed that these sales had not been reported as gross income. Hornstein had given the Government an income tax statement showing the cost of goods sold. It appears, from the report of the

case, that the Government used these figures and the figures on the defendant's books as a starting point for the computation of the tax which was actually due. Also, the Government introduced various statements made by the defendant during the course of the investigation. All this evidence was properly received against the defendant *when tested by the Ninth Circuit Rule* set out in the *Davena Case*. The independent evidence of a portion of the corpus delicti, supplied by the customers whose purchases had not been reported as gross income, was sufficient to justify giving probative force to the admissions of the defendant. Other rules would sustain the correctness of the Court's ruling in this case, among which would be the "shop book rule" and the rule laid down in *Warzower vs. U. S., 312 U. S. 342; 85 L. Ed. 877*. When independent evidence of unrelated gross income was produced, the admissions of the defendant and his books and records showing further unreported income and many discrepancies, were admitted against him, and he was properly charged with a resonable explanation of unreported income thus established.

The *Fenwick Case* (supra) was decided by the same court some five months after the *Hornstein Case*. In it there was no independent evidence *of any portion* of the corpus delicti.

In the *Fenwick Case* the Government relied upon the "Net Worth Method" to prove the *FACT* of unreported income. The "Net Worth Theory" was also advanced as being independent evidence to establish the necessary portion of the corpus delicti. Unfortunately, in the *Fenwick Case* the Government was placed in the position of being required to rely solely upon statements made to the investigating agents by the defendant for the purpose of establishing the cash on hand, cash in the bank, and other items of his assets at the beginning of the net worth period. In the *Fenwick Case* the Seventh Circuit Court examined all the facts to determine whether or not there was probative values in the *extrinsic or intrinsic* circumstances which could be said to establish some independent evidence of the corpus delicti. The facts in the *Fenwick Case* bear striking similarity to the facts in the instant case. One could almost substitute the name of Calderon for the name of Fenwick in the two situations.

It is true, as pointed out in Paragraph I herein, that the Seventh Circuit indicated that it was necessary for the Government to prove the corpus delicti by independent evidence beyond a reasonable doubt before the admissions of the defendant could be used. An examination of the facts will show that, whatever the rule may *actually* be in the Seventh Circuit (See analysis of the Hornstein

Case above), in the *Fenwick Case* there was no independent evidence touching *any portion* of the corpus delicti. On the exact facts as shown, the case would have been decided the same in the Ninth Circuit as it was in the Seventh Circuit.

The narrow application of the rule in the *Fenwick Case,* as well as its soundness and validity to such a fact situation, was pointed out by the same Court in the *Yeoman Case* (supra). In the latter case, just as in the *Hornstein Case,* the figures upon which the beginning of the net worth period were based came from a "Net Worth Statement" and records prepared by the defendant himself. Also, as in the *Hornstein Case,* there was independent evidence that Yeoman had falsely listed income as having been received by way of loans from a bank and from one E. T. Tiernan. Apparently, the money was fraudulently withdrawn as repayment of these ficticious loans in a later year. The evidence further disclosed that Yeoman had purchased a Nash automobile in the name of Tiernan without the latter's knowledge or consent, which automobile was actually Yeoman's. The Seventh Circuit beautifully summarizes our own opinion as to why the facts in the *Fenwick Case* and in the *instant (Calderon) case are* notably different from those in the *Hornstein Case,* the *Yeoman Case,* the *Davena, Jr. Case,* the *Guzik Case,* and others.

The Seventh Circuit Court said:

"In the Fenwick Case, there was no proof that the taxpayer had not previously accumulated assets. The government agent admitted he had not inquired of defendant whether he had had cash on hand, accumulated from earnings from his business in the years prior to the period then under examination, and the United States Attorney stated that there might have been other assets. The Fenwick opinion pointed out that the evidence on the trial fell short of excluding all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived. Contrasting the inadmissibility of the net worth statement in the Fenwick Case, where it was the result of computation by the agent, in the case at bar the net worth statement was prepared by Yeoman himself, without the assistance of a revenue agent, and while it probably was inaccurate in some respects, it cannot be considered as an extra-judicial admission, unsupported by other evidence, and was in fact admissible into evidence as an admission against interest."
(193 Fed. 2d 869)

We believe the foregoing analysis clearly establishes the *Fenwick Case*, the *Chapman Case* and the *Bryan Case* as sound authority to be applied (as was the *Spriggs Case*) within the narrow limits of the fact situations therein.

In the instant case, there is no proof that the taxpayer Calderon had not previously accumulated assets. The government agent, Mr. Tucker, admitted he had not inquired of the defendant whether he had cash in his safe, accumulated from earnings from his business in prior years. (R. 85) Tucker admitted that he was told by Calderon and by Verdugo that large amounts of cash were ordinarily kept in the safe. (R. 86)

In the Calderon Case there is no disagreement as to the valuation of the property, and, in fact, the defendant stipulated that Tucker could testify as to these valuations without producing the records, or evidence, upon which computation of value would be based. But, in the Calderon Case, there is no proof that the property, which is admitted that he owned at the beginning of 1945, constituted all the assets he had at that time. There is no proof that Calderon had not accumulated cash over the previous eight or ten years in which he had been engaged in the same business. The agent Tucker testified that he knew conditions had been excellent in Douglas and vicinity in the years prior to 1946. (R. 83) He knew that Calderon had not deposited

money, as he usually did, in his savings account, between June, 1943 and October, 1945. (R. 84) Tucker's investigation showed that Calderon spent approximately $16,000.00 in 1946, and large sums again in 1948 in the purchase of new equipment. (R. 90) He knew that business conditions changed seriously for the worse after 1946 in the Douglas area, and that it was incredible that Calderon would be able to earn as much as his (Tucker's) computation showed in those years. Tucker further testified that he knew from his investigation of other coin opearted machines businesses, that the business required large amounts of cash be kept readily available, and he knew that Calderon had a safe in which he did keep money. Tucker further testified that he did not ask Calderon how much money was in the safe, nor did he ask Mr. Verdugo or anyone else, as to the amounts of cash in the safe at the beginning of 1945. (R. 85) He testified that Calderon cooperated fully with the investigating agents. (R. 88)

Under these circumstances, the "Net Worth Theory" had no reasonably certain beginning. From Mr. Tucker's testimony, the assets of Calderon at the beginning of the net worth period, *were reasonably and probably,* much larger than those alleged by witness Tucker. The proof shows, without question, that Tucker knew that his net worth computation was completely inaccurate.

The "Net Worth Theory" depends entirely upon the circumstance of the expenditure of considerably more money in subsequent years than the filed tax return shows the defendant received. The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant or the fact which is attempted to be established. *U. S. vs. Chapman, 168 Fed. 2d 997, U. S. vs. Fenwick,* (supra), *Spriggs vs. U. S.* (supra), *Bryan vs. U. S. 175 Fed. 2d 223 at 225, United States vs. Skidmore, 123 Fed 2d 604 at 608.*

Another point is that, if the extra-judicial admissions of the defendant are not given probative force in this case because there had been no independent evidence of any portion of the corpus delicti, the government has not excluded income from insurance, devises or bequests, gifts, or previous unpaid loans within any of the tax periods in question. All of these things must be clearly established before net worth computation becomes any value in evidence. Most of them can only be established by the admissions of the defendant.

In every case which we have examined, where admissions were properly used, there was ample *indicia of guilt* to surpass the requirements of the basic rule of the *Daeche Case.*

In every case where admissions were ruled as improperly used, there was *no such proof,* and there was more than a reasonable doubt of the guilt of

the defendant. Peculiarly, there was always some indication in the admissions of the defendant in the *Spriggs, Chapman, Fenwick, etc., Cases* that taxes were due the government. But, in each of these cases one is left, just as in this case, with the sure feeling that the defendant did not have any intent.

We suggest that the intent to defraud leaves tracks which courts always can see as *independent evidence* of some portion of the corpus delicti, and the plainly careless (Fenwick) or the ignorant and relying (Calderon) do not.

III.

ASSUMING THAT THE WRITTEN AND ORAL STATEMENTS OF THE DEFENDANT ARE ADMISSIBLE, THE "NET WORTH STATEMENT" UPON WHICH THE GOVERNMENT MUST RELY WAS NEVER ACTUALLY ESTABLISHED.

The government agents and witnesses, Tucker and Webb, freely admitted that a "Net Worth Statement" has no value unless the assets and liabilities at the beginning and end of the period in question are accurate. We cannot believe that counsel for the government will disagree on this point. We do not argue that the figures going to make up the "Net Worth Statement" of the defendant are substantially inaccurate with the exception of the item of "Cash on Hand" for the various years in-

volved; in fact, the defendant fairly and openly stipulated to such fact.

However, unless the "Cash on Hand" for the various years involved is established, the "Net Worth Statement" not only has no value herein but has not even been established. Until the "Cash on Hand" for the various periods involved has been established, the "Net Worth Statement" is largely a figment of the imagination.

This point is undoubtedly the most important single item of this case, and we feel an examination of the same deserves the closest scrutiny. The entire crux of the government's argument on this point appears on page 5 and 6 of the Brief for the Appellee. An examination of these pages will quickly disclose that the government has selected several questions and answers from the Transcript of Record which, standing alone, appear to substantiate the government's position to the effect that the defendant had "Cash on Hand" in the sum of $500.00 at the end of 1946, 1947, and 1948, and the sum of $1,971.50 at the end of 1949. Now, let us examine the actual testimony as a whole to discover the admitted source of information used by the witness in the selected questions and answers appearing on pages 5 and 6 noted above.

The selected questions and answers involve the testimony of Mr. Tucker, one of the investigating agents. True, in these questions and answers Mr.

Tucker stated that the defendant told him (Tucker) that he (the defendant) had the amounts noted on hand at the end of the respective years in question. However, at that point in his testimony, and over the objection of defendant's counsel, Mr. Tucker did not testify to the *actual conversation* between the witness and Calderon from which such figures were secured.

Now, let us study the cross-examination of Mr. Tucker to discover the actual source of the figures previously testified to by this witness. See page 80 of the Transcript of Record where defendant's counsel questioned Mr. Tucker as to the *actual conversation* between Mr. Tucker and Calderon rather than as to what Mr. Tucker *thought Mr. Calderon meant:*

Q "Mr. Tucker, before we go any further than that, isn't it true that when you talked to Mr. Calderon about the amount of cash he had on hand that *he told you he ordinarily carried around* $500.00 *in his pocket?* Is that right?"

A "*That is true.*" (Emphasis supplied)

Again on the same page counsel asks Mr. Tucker as follows:

Q "As a matter of fact, you related here in answer to Mr. K. Berry Peterson's question a conversation with Mr. Calderon in which you said that he had cash on hand ordinarily of about $500.00.

Actually what Mr. Calderon said was he ordinarily carried that much in his pocket, didn't he?"

A "*Yes, he said that.*" (Emphasis supplied)

Again beginning at the bottom of page 81 of the Transcript of Record read the various questions and answers of Mr. Tucker in connection with certain notes which he prepared immediately following the conversation with the defendant, Mr. Calderon. Keep in mind that these notes were prepared immediately after the conversation on the admission of Mr. Tucker himself; it is easily understood that these notes are probably the most accurate record of the conversation available. You will see that these notes do not even touch on "Cash on Hand" for any date *except January 1, 1944.* Did Calderon say that he had $500.00 cash on hand at that time or any time? No, he said, "*On January 1, 1944, he had approximately $500.00 cash in his pocket.*" (Emphasis supplied)

See again in the middle of page 85 of the Transcript of Record the following question and answer:

Q "Can you under oath say that you asked him how much money he ordinarily kept in his safe and had in his safe on January 1, 1945?"

A "*No, I cannot say I asked him that question.*" (Emphasis supplied)

On the same page we find the real source of the

question and answers appearing on pages 5 and 6 of the Brief for the Appellee. Note the last answer of the witness Tucker appearing on page 85 wherein he states *"This item of cash in pocket, as I said before, is terminology. I didn't interpret he carried five hundred in his pocket at all times."* (Emphasis supplied) *THE WITNESS TUCKER ADMITTED THAT HE ARBITRARILY, AND WITHOUT ANY REASON WHATSOEVER, PLACED HIS INTERPRETATION ON THE WORDS, "FIVE HUNDRED IN HIS POCKET" AS MEANING "*$500.00 *CASH ON HAND" FOR EVERY YEAR INVOLVED EXCEPT THE YEAR* 1949*!!*

Once more on page 86 appears substantially the same testimony:

Q "You don't know?"

A "All I know is what he told me he customarily had."

Q *"In his pocket, $500.00?"*

A *"He said in his pocket."* (Emphasis supplied)

Then, examine the questions and answers appearing on the lower half of page 86 of the Transcript of Record wherein the witness Tucker admitted that at a previous trial of this case both Mr. Calderon and Mr. Verdugo, Calderon's bookkeeper, told him (Tucker) that the defendant kept

cash in his safe. At the second trial (which is herein appealed) Mr. Tucker's recollection conveniently did not avail him of an answer to the question of whether Calderon or Verdugo had told him (Tucker) that cash was kept in the safe. However, when his previous testimony was called to his attention, he stated in reference to the prior trial and his answers therein that *"My recollection was evidently better then."* (Emphasis supplied)

Counsel for the defendant not only sat through two trials of this action and carefully listened to all of the testimony, but they also read and reread the Transcript of Record herein many times. *The admitted and only source of the statement to the effect that the defendant had* $500.00 *cash on hand on the dates in question comes from the statement of the defendant that "On January 1, 1944, he had approximately $500.00 cash in his pocket."*

It is with great consternation that we contemplate the possibility of a sustained conviction of this man based on such testimony. Will investigating agents in similar cases be permitted to place their arbitrary interpretations on chance remarks of future defendants and support convictions therewith? To do so would make of every citizen a modern Damocles seated beneath a sword hung by a single hair, the sole strength of which lies in the conscience of government investigating agents permitted to arbitrarily interpret the citizen's state-

ments as they might wish. The man who says: "I saw a nuclear blast at the Nevada testing grounds," may well be convicted as a spy. Or, another man who, when told of a killing with a .45 automatic pistol, says: "I have a .45 automatic," may well be convicted of murder. Example after example will come to mind when considering the consequences of such a legal ruling.

CONCLUSION

Although we realize that we have burdened this Court with an overlong Reply Brief, we feel justified in asking the Court's indulgence. We are satisfied that when the respective briefs herein have been considered in the light of the authorities cited and the fact stituation presented, a well-defined pattern or picture will emerge; we are of the opinion that when this pattern or picture is placed against the background of the applicable laws and precedent cases in connection therewith, the error of the Court below will become apparent. We respectfully submit that the decision of the District Court cannot here be sustained.

Dated May 28, 1953.

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